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December 20, 2002

EX PARTE

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
Room TW-A325
445 12th Street, S.W.
Washington, D.C. 20554

Re: CC Docket Nos. 01-338; 96-98; 98-147

Dear Ms. Dortch:

On December 19, 2002, Scott Sawyer and Dave Graham of Conversent Communications and I met with Daniel Gonzalez, Legal Advisor to Commissioner Kevin Martin. During the meeting, we discussed Conversent's network and its need for unbundled network elements, especially dark fiber transport. The attached presentation was distributed at the meeting and comprised the basis for the Conversent presentation.

Pursuant to Section 1.1206(b)(2) of the Commission's rules, 47 C.F.R. § 1.1206(b)(2), a copy of this letter is being filed electronically for inclusion in the public record of each of the above-referenced proceedings.

Sincerely,

/s/

Thomas Jones
Counsel to Conversent Communications

Enclosure

cc: Daniel Gonzalez

TALKING POINTS OF CONVERSENT COMMUNICATIONS, LLC

I. DESCRIPTION OF CONVERSENT'S ENTRY STRATEGY

- Conversent provides local and long distance voice and broadband services to small and medium sized business customers in small cities and suburbs.
- The average Conversent customer has approximately 7 lines and many Conversent customers have only a single business line.
- Although it has been providing service only since the fall of 1999, Conversent currently has over 23,000 customers and over 160,000 access lines in its 7-state footprint.
- Conversent is currently EBITDA positive and anticipates that it will be free cash flow positive during the second quarter of 2003.
- Conversent has found that it can efficiently provide voice and broadband services to small businesses in small cities and in suburban areas by relying on its own switch and collocated transmission equipment and by leasing collocation space, unbundled loops and unbundled interoffice dark fiber transport from the ILEC.
- *The availability of unbundled IOF dark fiber enables Conversent to reach end-users in small cities and suburbs throughout its 7-state region.* Prior to the availability of unbundled IOF dark fiber, it was not economical for facilities-based CLECs to reach customers in these areas.
- In addition to providing voice services, Conversent uses unbundled loops and unbundled IOF dark fiber to provide two kinds of broadband service: SDSL and DS-1 service, including integrated DS-1 service. The ILECs do not actively offer these services.

II. THE COMMISSION SHOULD RULE THAT REQUESTING CARRIERS ARE IMPAIRED IN THE ABSENCE OF DARK FIBER UNLESS FOUR SUBSTITUTES ARE AVAILABLE

- In its decision in *USTA v. FCC*, the D.C. Circuit explained that the Commission must consider the extent to which entry barriers associated with obtaining a network element from a source other than the ILEC in a particular market are significant enough that competition would be harmed absent the imposition of an unbundling obligation.
- In other words, the Court asked the FCC to determine the extent to which an ILEC possesses market power over the provision of a network input needed by the ILEC's competitors.
- The conventional way to assess the extent to which an ILEC has market power over the provision of an input like a UNE is to define the relevant product and geographic markets, assess the level of concentration in the relevant market, and then assess the extent to which the level of concentration reflects market power by examining entry barriers in the market.
- The question of whether 2 products are substitutes is determined by assessing the extent to which customers have switched and will switch from product A to product B and vice versa in response to an appropriately defined price increase in either A or B.
- In the case of dark fiber, the only possible substitute would be lit transmission facilities. As explained below, a close examination of dark fiber demonstrates that it must be viewed as a separate product market for purposes of the impairment analysis.

A. Dark Fiber and Lit Fiber are in a Separate "Product Market" for Purposes of the Impairment Analysis

- Dark fiber gives much greater control over the quality of service requesting carriers can offer than lit fiber.
- In Massachusetts, Conversent has shown that relying on lit interoffice transport would force it to use 96 more multiplexers, and would thus introduce 96 more potential points of failure, than is the case with dark fiber. Degradation of service quality is almost inevitable where so many potential points of failure are added.

- CLECs relying on wholesale lit transport facilities can not monitor their networks from their Network Operation Center ("NOC"). As a result, CLECs lose the ability to monitor their networks to ensure timely repair and maintenance. This control is absolutely critical to a CLEC's ability to compete.

B. Each Point-to-Point Route On Which ILEC Dark Fiber Exists Constitutes a Separate Geographic Market for Purposes of the Impairment Analysis

- One important aspect of the *USTA v. FCC* Decision is its insistence on a granular analysis of impairment where differences in geographic market characteristics exist.
- With regard to transmission facilities like dark fiber, it is clear that requesting carriers view each point-to-point route on which ILEC dark fiber exists as a separate geographic market.
- A requesting carrier that needs transmission between points A and B can not substitute that functionality with transmission between points B and C.
- It is important to emphasize that a non-ILEC source of supply should not be viewed as an offering in the same geographic market as ILEC dark fiber if the non-ILEC fiber merely passes *near* one or more of the end points served by the ILEC dark fiber. In other words, the non-ILEC dark fiber must actually connect both end points.
- The obstacles that stand in the way of constructing a lateral facility to connect the non-ILEC dark fiber provider's facilities to the end point served by the ILEC are simply too significant to assume that such a network extension could be efficiently constructed. These obstacles include the cost, delay and uncertainty associated with obtaining permits, performing excavation work, and securing necessary access to rights of way, pole attachments, and conduit space. These costs are variable and impossible to predict.
 - ◆ For example, in 1999 Conversent attempted to self-provision fiber between Conversent's switch in Worcester, Massachusetts to Verizon's switch in the same city, a distance of 11,000 feet. It took Conversent 6 months just to gain access to Verizon's conduit space and another 5 months to pull the cable from Conversent's switch to Verizon's switch.
 - ◆ The per mile construction cost of deploying dark fiber increases by approximately 10 times where a carrier can not obtain access to underground conduit.

- ◆ The charges and delays associated with obtaining access to public rights of way also vary significantly from municipality to municipality and according to the time of year.

C. The Market for Dark Fiber is Characterized by Unusually High Entry Barriers

- The D.C. Circuit explained in *USTA v. FCC* that the Commission's impairment analysis must be linked to some degree to the extent to which duplication of a particular network element is characterized by higher than usual entry barriers, especially economies of scale that might make duplication by numerous competitors wasteful.
- Dark fiber is characterized by economies of scale. In absolute terms, the cost of deploying fiber facilities is enormous.
 - ◆ Conversent estimates that the cost to install its own fiber in Verizon conduit would be approximately \$49,843.00 per mile in Massachusetts.
 - ◆ If conduit were not available, Conversent estimates that the cost to install its own underground fiber would be approximately \$485,812.80 per mile in Massachusetts.
 - ◆ In addition, one must also consider municipal rights of way issues; licensing and the coordination of street digs (which can cause serious deployment delays); high municipal fees and other onerous conditions placed upon CLECs; local moratoria on fiber deployment; collocation costs and delays; and most importantly the continued closure of financial markets to CLECs.
 - ◆ Those costs are even greater when one considers that Conversent needs only 4 strands of fiber for each interoffice span. Historically, Verizon has typically installed 96 - 144 strands of fiber for each interoffice span.
- Investment in dark fiber requires the commitment of large up-front sunk costs. Virtually every one of the costs associated with dark fiber deployment is unrecoverable once incurred. This makes investment in dark fiber much more risky than most other kinds of investments.
- Potential entrants into the market for dark fiber suffer from the ILECs' substantial first-mover advantages. The ILECs have obtained access to public rights of way, to private buildings, and to investment capital during the period of protected monopoly status on terms and conditions that are more favorable than can be obtained by new entrants. ILECs generally do not face the same building access and rights of way

obstacles faced by a potential entrant. This is because ILECs already have the facilities in place and can provide the facility in a matter of days.

D. In Light of the Entry Barriers Associated with Competitive Provision of Dark Fiber, the Commission Should Adopt a Four-Substitute Test for Impairment

- The presence of significant entry barriers makes it highly likely that ILECs will retain the ability to charge prices far above the competitive level even after non-ILEC suppliers have entered the market. The ILECs will only begin to lose that power when four or more substitutes have entered the relevant market.
 - ◆ This is the logic of the Merger Guidelines used by the Department of Justice and Federal Trade Commission to assess the lawfulness of proposed mergers.
 - ◆ It is only when four non-ILEC alternatives have entered the market that the HHI (which would be 2000) comes reasonably close to the level of market concentration deemed permissible in the Merger Guidelines.

- The following impairment test is appropriate for dark fiber:
 - ◆ Requesting carriers would be presumed to be impaired in the absence of unbundled ILEC dark fiber. This presumption can be rebutted only where an ILEC can demonstrate to a state commission that four substitutes exist in the relevant geographic market.
 - ◆ In such a proceeding, the state commissions would conduct a granular analysis to determine whether CLECs have four robust market substitutes for ILEC dark fiber along a specific route (e.g., the inquiry must examine whether there are actual viable alternatives to ILEC dark fiber between two identified points in the network, such as between two specific ILEC wire centers, or between one ILEC wire center and a specific customer premises).
 - ◆ To qualify as a substitute, a non-ILEC source of supply must be deemed financially stable by the state commission.
 - ◆ The state commission would not be permitted to consider the existence of alternative sources of lit service along that same route in its evaluation of alternative sources of dark fiber, because lit service is not an adequate substitute for dark fiber. Moreover, a state could not assume that a wholesaler of lit transport and the relevant geographic market would also offer dark fiber.

- ◆ Providers of lit transport simply can not offer dark fiber in many circumstances. For example, where a lit provider has deployed a ring architecture, it can not sell a segment of one of its fiber strands for purchase along a particular point-to-point route without rendering useless the rest of the fiber strand around the ring. This is obviously an inefficient use of facilities, and a non-ILEC supplier would never be able to make fiber available in these circumstances for anything close to a competitive price.